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Supreme Court, U.S.
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No. 91-1501

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1992

CHARLES G. DANNIS and STEPHEN T. CROSSON
Petitioners
V.
RESOLUTION TRUST CORPORATION, Receiver for First Savings and Loan Association of Waco, Receiver for First Savings and Loan Association of Temple, and Conservator of First Savings and Loan, F.A., Temple, Texas,
and
NORTHPARK JOINT VENTURE, STEVEN S. SCHIFF, BARRY HOWARD, ROBERT L. SCHIFF, CHARLES H. PERRY, HERBERT G. SCHIFF, and TELSTAR PARTNERSHIP
Respondents

APPENDIX

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 91-1501

FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF TEMPLE, and RESOLUTION TRUST CORPORATION, as Receiver for First Savings and Loan Association, F.A., Waco.,
Plaintiffs-Counter Defendants-Appellees,

versus

NORTHPARK JOINT VENTURE, ET AL.,
Defendants,

STEVEN S. SCHIFF, CHARLES G. DANNIS, STEPHEN T. CROSSON, BARRY HOWARD, ROBERT L. SCHIFF, CHARLES H. PERRY, HERBERT G. SCHIFF and TELSTAR PARTNERSHIP,
Defendants-Counter-Claimants-Appellants.

Appeals from the United States District Court for the Northern District of Texas

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ON PETITIONS FOR REHEARING
(May 21, 1992)

Before KING, JOHNSON and DAVIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby Denied.

ENTERED FOR THE COURT:

_____
United States Circuit Judge
5-19-92

RESOLUTION TRUST CORPORATION, as receiver for First Savings and Loan Association of Waco and First Savings and Loan Association of Temple, and as conservator of First Savings and Loan, F.A., Temple, Plaintiffs-Appellees.

v.

NORTHPARK JOINT VENTURE, et al., Defendants, and Steven S. Schiff, Charles G. Dannis, Stephen T. Crosson, Barry Howard, Robert L. Schiff, Charles H. Perry, Herbert G. Schiff and Telstar Partnership, Defendants-Appellants.

No. 91-1501.
United States Court of Appeals, Fifth Circuit

FIFTH CIRCUIT OPINION

April 24, 1992.

Action was brought in state court against guarantors to recover deficiency remaining after foreclosure sale. Action was removed to federal court by Resolution Trust Corporation (RTC) which was appointed receiver for assignees of promissory note. The United States

District Court for the Northern District of Texas, Jerry Buchmeyer, J., declined to reconsider state court ruling granting partial summary judgment against guarantors and entered judgment against guarantors. Guarantors appealed. The Court of Appeals, Johnson, Circuit Judge, held that: (1) it had appellant jurisdiction; (2) Texas law applied; and (3) guarantors were liable for deficiency.

Affirmed.

1. Guaranty 82 (2)

Under Texas law, guarantor may waive right to have maker of underlying note made a party defendant.

2. Removal of Cases 114

Prior state court order in essence is federalized when action is removed to federal court, although order remains

subject to reconsideration just as it had been prior to removal. 28 U.S.C.A. § 1450.

3. Federal Court 433

Federal procedure governs enforcement of prior state court order in case removed to federal court.

4. Removal of Cases 114

Where prior state court order in case removed to federal court is summary judgment, federal court must insure that order is consistent with requirements of summary judgment rule and if court declines to reconsider state court summary judgment, then federal court certifies that order is indeed consistent with rule and standard of review is same as if federal court itself had entered order: Court of Appeals will review record de novo,

resolving all reasonable doubts and drawing all reasonable inferences in favor of party opposing summary judgment. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

5. Federal Courts 668

Timely notice of appeal is mandatory prerequisite to exercise of appellate jurisdiction. F.R.A.P.Rule 4(a)(1), 28 U.S.C.A.

6. Federal Courts 668

Notice of appeal, filed four days before district court entered final judgment refusing to reconsider state court summary judgment entered in favor of plaintiffs before removal, served as effective notice from final judgment; at time state court first entered summary judgment, decision was a partial judgment that determined liability of individual

guarantors for deficiency remaining after foreclosure but did not purport to determine liability of debtor, and at that time summary judgment would not have been appealable, even if state court had entered judgment but by time federal district court entertained motion to reconsider summary judgment, debtor was bankrupt and had been dismissed from action so that order refusing to reconsider summary judgment adjudicated rights of all remaining parties and that order would have been appealable if district court had immediately entered judgment. F.R.A.P.Rule 4(a)(1,2), 28 U.S.C.A.

7. Federal Court 409

Federal court is required to follow choice of law rules of state in which it sits.

8. Contracts 276

Under Texas choice of law rules, in those contract cases in which parties have agreed to enforceable choice of law clause, law of chosen state must be applied but in those cases in which parties have not agreed to enforceable choice of law clause, law of state with most significant relationship to particular substantive issue will be applied.

9. Guaranty 28

Action against guarantors of promissory note for deficiency following foreclosure was an action involving enforcement of underlying debt and did not arise out of real property foreclosure; therefore, promissory note which specified that Texas law would govern its terms, not deed of trust which

specified Mississippi law would govern its terms, was involved and, thus, under Texas choice of law rules, law of Texas governed action.

10. Guaranty 28

Even if lender, borrower, and guarantors did not agree to application of Texas law in action arising out of promissory note, Texas law would apply under Texas choice of law rules to action against guarantors for deficiency following foreclosure where parties negotiated and executed note and guaranties in Texas, lenders were Texas residents, all guarantors except one were Texas residents or domiciliaries at time of execution of note and guaranties, and note and guaranties, by their express terms, were wholly performable in Texas.

11. Guaranty 36 (6)

Guarantors were liable under Texas law for unsatisfied indebtedness remaining after foreclosure, even though promissory note was nonrecourse as to borrower, where guaranty unambiguously stated that guarantors were required to pay unsatisfied "indebtedness" and promissory note excluded guarantors from its nonrecourse provision.

12. Guaranty 27

In construing guaranty contract under Texas law, primary concern of reviewing court is to ascertain intent of parties.

13. Guaranty 27

If guaranty is ambiguous under Texas law, then court must apply construction which is most favorable to guarantor.

14. Guaranty 92 (1)

If guaranty can be given certain or definite meaning or legal interpretation, then it is not ambiguous and court will construe contract as a matter of law under Texas law.

15. Guaranty 36 (1)

As general rule, liability of guarantor under Texas law is equal to that of its principal.

16. Guaranty 36 (1)

If guarantor agrees, guaranty contract can impose greater liability upon guarantor than note imposed upon principal under Texas law.

17. Guaranty 42 (1)

When guaranty agreement is absolute and unconditional, defendants are deemed under Texas law to have incorporated all of terms of note in guaranty.

18. Guaranty 42 (1)

Under Texas law, guaranty is absolute and unconditional if it requires no condition precedent to its enforcement against guarantor other than mere default by principal debtor.

19. Federal Civil Procedure 2492

Guarantors failed to satisfy their burden to demonstrate that summary judgment awarding attorney fees to Resolution Trust Corporation (RTC) as receiver for assignee's promissory note was inappropriate in deficiency action; attorney for RTC submitted summary judgment affidavit describing billable rate and hours expended and concluded that total amount of $93,463.60 was reasonable amount for services rendered and guarantors did not file counteraffidavit or file affidavit

arguing that billable hours were unreasonable. Fed.Rules Civ.Proc.Rule 56(e), 28 U.S.C.A.

Appeal from the United States District Court for the Northern District of Texas.

Before KING, JOHNSON and DAVIS, Circuit Judges.

JOHNSON, Circuit Judge:

This action originated in state court as a suit to recover the balance of a debt. The state court granted partial summary judgment against the defendants, concluding that the defendants were responsible for the unsatisfied indebtedness. After the case was removed to federal district court, the federal court declined to reconsider the state court ruling and entered a judgment against the defendants. Unable to

conclude that the district court committed reversible error, this Court affirms.

I. FACTS AND PROCEDURAL HISTORY

In April 1985 Northpark Joint Venture ("Northpark"), a joint venture formed under Texas law, entered into a loan agreement with Texas State Mortgages, Inc. ("TSM"). TSM advanced Northpark $9.15 million, which Northpark in a promissory note agreed to repay with interest. To secure repayment of the loan, Northpark executed a deed of trust granting TSM a lien upon certain real property located in Mississippi. In addition, the individuals who formed Northpark--Steven S. Schiff, Charles G. Dannis, Stephen T. Crosson, Barry Howard, Robert L. Schiff, Charles H. Perry,

Herbert G. Schiff and Telstar Partnership--executed absolute and unconditional personal guaranties to repay up to $3,202,500 of the $9.15 million indebtedness.[1]

Two years later, Northpark defaulted on its obligation under the promissory note. Unable to collect repayment, TSM assigned its rights in the loan transaction to First Savings and Loan Association of Waco ("First Waco") and First Savings and Loan Association of Temple ("First Temple"). Pursuant to the

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[1] Two separate guaranties are in issue in this case. The first guaranty was signed by defendants Herbert G. Schiff, Robert L. Schiff, Steven S. Schiff, Charles H. Perry, Charles G. Dannis and Stephen T. Crosson, while the second guaranty was signed by Robert B. Howard. The separate guaranties are virtually identical in their terms.

terms of the loan agreement, First Waco and First Temple made a formal demand that Northpark and its individual guarantors cure the default. The default remained uncured, and First Waco and First Temple sold the Mississippi property in a public foreclosure sale for $3,637,500. The proceeds of the foreclosure sale were applied to the unpaid principal, leaving an unsatisfied indebtedness of $3,253,464.96 in principal and $1,200,683.11 in accrued interest.

Following foreclosure, First Waco and First Temple filed suit in Texas state court against Northpark and its individual guarantors to recover the amount of the unsatisfied indebtedness. The individual guarantors filed a counterclaim seeking a declaratory

judgment that they were not liable under the note or their guaranties. Both sides then filed motions for summary judgment. In September 1989 the court granted partial summary judgment against the individual guarantors, concluding that the guarantors must bear personal liability for $32,202,500 of the unsatisfied indebtedness.[2]

[1] While the action was still pending in state court, Northpark

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[2] As early as January 3, 1989, the state court had decided that it would grant partial summary judgment against the individual guarantors, but it reversed itself on reconsideration. Only after a second reconsideration did the state court finally conclude that the guarantors were liable for $3,202,500, the maximum amount of the guaranties.

declared bankruptcy and was dismissed from the lawsuit.[3] Moreover, First Waco and First Temple became insolvent. The Resolution Trust Corporation ("RTC") was appointed to serve as the receiver of both First Waco and First Temple.[4] In

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[3] A guarantor may waive his right to have the maker of the underlying note made a party defendant. *Yandell v. Tarrant State Bank*, 538 S.W.2d 684, 688 (Tex.Civ.App.--Fort Worth 1976, writ ref'd n.r.e.).

[4] In July 1989 the Federal Home Loan Bank Board declared First Waco insolvent and appointed the Federal Savings and Loan Insurance Corporation to serve as receiver. The Bank Board then organized First Savings and Loan, F.A., Waco, Texas ("First F.A. Waco") and appointed the FSLIC to serve as conservator of the new savings and loan. Under a purchase and assumption agreement, the Bank Board transferred to First F.A. Waco almost all of First Waco's assets,

August 1990 the RTC intervened in the state court action and removed the case to federal court. The individual defendants filed a motion for reconsideration of the partial summary judgment. The federal district court denied the motion for reconsideration, ruling that the guarantors indeed were liable for $3,202,500 of the unsatisfied

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including the promissory note and the personal guaranties. The Resolution Trust Corporation subsequently replaced the FSLIC as receiver of First Waco and as conservator of First F.A. Waco. Months later, the Office of Thrift Supervision declared First Temple insolvent and appointed the RTC receiver. Under another purchase and assumption agreement, the Office of Thrift Supervision designated the RTC conservator of a new institution, First Savings and Loan, F.A., Temple, Texas, which received almost all of the assets once belonging to the defunct First Temple.

indebtedness, plus interest and "reasonable" attorneys' fees.

On May 16, 1991, the individual defendants filed a notice of appeal. Four days later, the federal district court entered a "Final Judgment" denying all relief that the defendants had sought in their counterclaim and granting the RTC a specific award of $93,463.60 in attorneys' fees.

II. DISCUSSION

[2] The defendants argue that the district court erred in declining to reconsider the partial summary judgment that the state court had entered. After removal of an action to federal district court, "[a]ll injunctions, orders, and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved or

modified by the district court." 28 U.S.C. § 1450 (1988). A prior state court order in essence is federalized when the action is removed to federal court, although the order "remains subject to reconsideration just as it had been prior to removal." *Nissho-Iwai American Corp. v. Kline,* 845 F.2d 1300, 1303 (5th Cir.1988).

[3,4] Federal procedure governs the enforcement of a prior state court order in a case removed to federal court. *Id.* Thus, where the prior state court order is a summary judgment, the federal court must ensure that the order is consistent with the requirements of Rule 56(c) of the Federal Rules of Civil Procedures. *See* Fed.R.Civ.P. 56(c) (permitting summary Judgment if "the pleadings, depositions, answers to interrogatories,

and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.") If the federal court declines to reconsider the state court summary judgment, then the federal court certifies that the order is indeed consistent with Rule 56(c). The standard of review is the same as if the federal court itself had entered the order: this Court will review the record de novo, resolving all reasonable doubts and drawing all reasonable inferences in favor of the party opposing the summary judgment. *FDIC v. Hamilton,* 939 F.2d 1225, 1227 (5th Cir.1991).

Before we reach the merits of the summary judgment in this case, we must consider two preliminary questions: (1)

whether this Court has acquired the requisite appellate jurisdiction and (2) whether Mississippi or Texas law governs the relative rights of the parties.

A. *Appellate Jurisdiction*

[5,6] A timely notice of appeal is a mandatory prerequisite to the exercise of appellate jurisdiction. *United States v. Robinson*, 361 U.S. 220, 224, 80 S.Ct. 282, 285, 4 L.Ed.2d 259 (1960). Rule 4(a)(1) of the Federal Rules of Appellate Procedure requires an appellant to file its notice of appeal "within 30 days *after* the date of entry of the judgment or order appealed from." Fed.R.App.P. 4(a)(1) (emphasis added). The defendants in this case filed their notice of appeal four days *before* the district court entered its final judgment. Consequently, under Rule 4(a)(1), their

notice of appeal was premature.

A premature notice of appeal is not necessarily ineffective. In some circumstances, Rule 4(a)(2) of the Federal Rules of Appellate Procedure will permit an appellate court to exercise its jurisdiction despite a premature notice. Rule 4(a)(2) provides that a notice of appeal "filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof." Fed.R.App.P. 4(a)(2). This rule recognizes that, unlike a tardy notice of appeal, certain premature notices do not prejudice opposing parties and therefore "should not be allowed to extinguish an otherwise proper appeal." *FirsTier Mortgage Co. v. Investors Mortgage Ins. Co.*, --U.S.--, 111

S.Ct.648, 651, 112 L.Ed.2d 743 (1991).

In *FirsTier Mortgage Co. v. Investors Mortgage Insurance Co.*, the United States Supreme Court attempted to determine the extent to which Rule 4(a)(2) salvages a premature notice of appeal. The plaintiff in *FirsTier Mortgage* filed a suit alleging that the defendant breached several insurance contracts. The district court granted summary judgment in favor of the defendant, but declined to impose final judgment until the defendant submitted proposed findings of fact and conclusions of law. Before the district court could issue its final judgment, the plaintiff filed a notice of appeal from the summary judgment ruling. The Supreme Court concluded that the notice of appeal, although premature, was effective to

invoke the jurisdiction of the federal appellate courts. 111 S.Ct. at 653. According to the Court, a premature notice of appeal relates forward to final judgment and serves as an effective notice from the final judgment whenever it follows "a decision that *would be* appealable if immediately followed by the entry of judgment." *Id.* (emphasis in original).

Like the notice of appeal in *FirsTier Mortgage*, the notice of appeal in the instant case is an effective notice. The defendants in this case appeal the district court order refusing to reconsider the summary judgment in favor of the plaintiffs. At the time that the state court first entered the summary judgment, this decision was a partial judgment that determined the

liability of the individual guarantors, but did not purport to determine the liability of defendant Northpark. Thus, at that time, the summary judgment would not have been appealable, even if the state court had entered judgment. However, by the time that the federal district court entertained the motion to reconsider the summary judgment, Northpark was bankrupt and had been dismissed from the action. Since Northpark was no longer a party, the order refusing to reconsider the summary judgment adjudicated the rights of all the remaining parties to the action. This order would have been appealable if the district court had immediately entered judgment. *See Hardy v. Gulf Oil Corp.*, 949 F.2d 826, 829 n. 6(5th Cir.1992) (district court an enter

judgment if it "has effectively disposed of all the claims before it"); *see also Jetco Electronic Indus., Inc. v. Gardiner*, 473 F.2d 1228, 1231 (5th Cir.1973). Accordingly, although filed before final judgment, the notice of appeal in this case serves as an effective notice from the final judgment.[5] This Court can exercise its

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[5] Prior to the decision in *FirsTier Mortgage*, the Fifth Circuit had reasoned that, as long as the parties in a case had not filed post-judgment or posttrial motions, a notice of appeal was effective if filed before the district court announced a final judgment. *See Alcom Electric Exchange, Inc. v. Burgess*, 849 F.2d 964, 967 (5th Cir.1988); *Alcorn County v. United States Interstate Supplies*, 731 F.2d 1160, 1165-66 (5th Cir.1984). Because we conclude that the facts in the instant case fall within the exception described in *FirsTier Mortgage*, we do not address whether the rule in *Alcom Electronic Exchange* and

appellate jurisdiction.

B. *Choice of Law*

In refusing to reconsider the summary judgment entered in state court, the federal district court reasoned that Texas law required the defendants to bear responsibility for the amount of their guaranties. The defendants argue that the district court should have applied Mississippi law, not Texas law. The RTC concedes that if Mississippi law governs the substantive issues in this lawsuit, then summary judgment would have been inappropriate. *See Lake Hillsdale Estates, Inc. v. Galloway*, 473 So.2d 461, 466(Miss.1985); *Mississippi Valley Title Ins. Co. v. Horne Constr. Co.* 372 So.2d 1270, 1272(Miss.1979). Nonetheless, we

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Alcorn County survives *FirsTier Mortgage*.

conclude that the district court did not err in applying Texas law.

[7,8] A federal court is required to follow the choice of law rules of the state in which it sits. *Klaxon v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496, 61 S.Ct. 1020, 1021, 85 L.Ed. 1477 (1941). In this case, therefore, the federal district court must look to the Texas choice of law rules. Under the Texas rules, in those contract cases in which the parties have agreed to an enforceable choice of law clause, the law of the chosen state must be applied. *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 678 (Tex.1990).[6] But in those cases

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[6] Texas has adopted section 187 of the Restatement (Second) of Conflict of Laws. *DeSantis*, 793 S.W.2d at 678. Section 187 states the appropriate choice of law rule governing

in which the parties have not agreed to an enforceable choice of law clause, "the law of the state with the most significant relationship to the particular substantive issue will be applied." *Duncan v. Cessna Aircraft Co.*,

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contract cases involving a contractual choice of law clause. In most such cases, the law of the state chosen in the clause should be applied. However, under subsection 2(b) of section 187, the law of the state chosen in a contractual choice of law clause should *not* be applied if "application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state...and which...would be the state of the applicable law in the absence of an effective choice of law by the parties." Restatement (Second) of Conflict of Laws § 187(2)(b)(1971). We do not address this exception here.

665 S.W.2d 414, 421 (Tex.1984).

[9] Both the promissory note and the deed of trust contain separate choice of law clauses.[7] The promissory note specifies that the laws of the state of Texas shall govern its terms. On the other hand, the deed of trust specifies that Mississippi law shall govern its terms, and it further provides:

> [If the Grantor defaults on its obligations, the] Trustee ... shall...sell all or any part of the Property after giving notice of the time, place and terms of sale as required by Section 89-1-55 of the Mississippi Code of 1972... *Grantor shall remain liable for any deficiency on the Obligations.*

Deed of Trust § 9, at 3 (emphasis added).

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[7] Unlike the other documents, the guaranties do not contain a choice of law clause.

The defendants contend that the choice of law clause in the deed of trust is enforceable. They argue that the plaintiffs brought an action for a deficiency judgment and that, because the deed of trust creates the right to a deficiency judgment, the choice of law clause in the deed of trust should govern.

The flaw in this argument is the erroneous assumption that the deed of trust creates the right to a deficiency judgment. "An action against guarantors of a note for a deficiency following foreclosure on real property is an action involving enforcement of the underlying debt." *Resource Savings Ass'n v. Neary*, 782 S.W.2d 897, 902 (Tex.App.--Dallas 1989, writ denied). It does not arise out of the real estate foreclosure. *Id.*

See also First Commerce Realty Investors v. K-F Land Co., 617 S.W.2d 806, 809 (Tex.Civ.App.--Houston [14th Dist.] 1981, writ ref'd n.r.e.). Thus, the promissory note and the guaranties, not the deed of trust, create the right to a deficiency judgment against the guarantors of a note. The deficiency judgment clause in the deed of trust has no effect in this case.[8]

Because the deed of trust does not provide the source for the action against the defendants, the choice of law clause

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[8] In determining whether the choice of law clause in the deed of trust is "enforceable," this Court must look to Texas law because Texas supplies the applicable choice of law rules. *DeSantis*, 793 S.W.2d at 678. Texas cases therefore determine whether a deficiency action against the guarantors of a note arises out of the deed of trust.

in the deed of trust is not enforceable: the parties cannot be said to have agreed that Mississippi law would govern a deficiency judgment action against the guarantors. If anything, it appears that the parties agreed to the application of Texas law. The promissory note, which in part creates the right to a deficiency judgment against the defendant guarantors, states that Texas law governs the obligations arising under the note and loan agreement. Texas State Mortgages, the predecessor in interest of plaintiff RTC, was a direct party to this promissory note and presumably helped negotiate the choice of law clause. The individual defendants agreed to guaranty the enforcement of the note and, as a consequence, essentially ratified the choice of law clause. *See First Commerce*

Realty Investors, 617 S.W.2d at 809.

[10] But even if the parties did not agree to the application of Texas law, the same result ensues. In the absence of an enforceable choice of law clause, the law of the state that has "the most significant relationship to the transaction and the parties" must be applied. *See DeSantis*, 793 S.W.2d at 678 (quoting Restatement (Second) of Conflict of Laws § 188 (1971)).[9]

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[9] Section 188 of the Restatement, which the Texas Supreme Court adopted in *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 678-79 (Tex.1990), states the choice of law rule governing contract cases that do not involve an enforceable choice of law clause. It provides:
(1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship

to the transaction and the parties under the principles stated in § 6.

(2) In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

(a) the place of contracting,

(b) the place of negotiation of the contract,

(c) the place of performance,

(d) the location of the subject matter of the contract, and

(e) the domicil, residence, nationality, place of incorporation and place of business of the parties.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

(3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be

The state that has the most significant relationship to the transaction and the parties in this case is Texas. First, Texas has greater contacts with the transaction and the parties: (1) the parties negotiated and executed the note and guaranties in Texas; (2) First Waco and First Temple are Texas residents; (3) all of the defendants, except one, were Texas residents or domiciliaries at the time that the note and guaranties were executed; and (4) the note and guaranties, by their express terms, are wholly performable in Texas. Under the Texas choice of law rules, these contacts alone can be conclusive in determining the appropriate state law. *See Cook v.*

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applied, except as otherwise provided in §§ 189-199 and 203. Restatement (Second) of Conflict of Laws § 188 (1971).

Frazier, 765 S.W.2d 546, 549 (Tex.App.--Fort Worth 1989, no writ)(applying Texas law because Texas residents negotiated and executed the contracts in questions and made all contract payments in Texas).

Moreover, Texas has a greater interest in the application of its law. At stake here is whether Texas residents are liable under the personal guaranties they executed to a Texas corporation. Texas has a direct interest in ensuring that Texas debts are handled properly and that Texas debtors and creditors are treated fairly. By contrast, Mississippi has little interest in this case. In enacting their guaranty laws, Mississippi legislators and judges intended to protect Mississippi citizens. There is no reason why Mississippi would have an interest in the application of its laws

to resolve the claims of foreign creditors against foreign debtors. *Cf. Duncan*, 665 S.W.2d at 422. Thus, the relevant interests, as well as the relevant contacts, favor the application of Texas law.

We conclude that, under either the choice of law clause in the promissory note or the most significant relationship test, Texas law governs the substantive issues in this case. The district court did not err in determining that the choice of law clause in the deed of trust is unenforceable.

C. *The Merits of the Summary Judgment*

[11] The principal issue in this case is whether the defendants must bear responsibility for the unsatisfied indebtedness. The guaranties state that the defendants must pay the "indebtedness

or other liability ... which Northpark Joint Venture ... may now or at any time hereafter owe" its creditors. According to the defendants, this provision in the guaranties limits their liability to the amount that Northpark would be obligated to pay First Waco and First Temple. Under the terms of the promissory note and loan agreement, Northpark's debt is non-recourse, and Northpark cannot be held liable for any unsatisfied indebtedness remaining after foreclosure of the property in the deed of trust. The defendants argue that, because Northpark is not liable for the amount of debt in the note, they also cannot be held liable.

[12-14] The Texas rules for interpreting the breadth of a guaranty agreement are well established. In

construing a guaranty contract, the primary concern of the reviewing court is to ascertain the intent of the parties. *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex.1983). If the guaranty is ambiguous, then the court must apply the "construction which is most favorable to the guarantor." *Id.* at 394 n. 1. *See also Clark v. Walker-Kurth Lumber Co.*, 689 S.W.2d 275, 278 (Tex.App.--Houston [1st Dist.] 1985, writ ref'd n.r.e.). But if the guaranty "can be given a certain or definite meaning or legal interpretation, then it is not ambiguous and the court will construe the contract as a matter of law." *Coker*, 650 S.W.2d at 393.

On motion for reconsideration of the state court summary judgment, the federal district court ruled that the guaranties

which the defendants had executed were not ambiguous. The court reasoned that "[d]espite the fact that Northpark is not liable for the indebtedness underlying the Note, the indebtedness continues to exist." District Court Opinion at 5. Noting that the guaranties required the defendants to pay the "indebtedness," the district court concluded that the defendants must pay $3,202,500 of the remaining balance of the debt,[10] and accordingly, it declined to reconsider the state court summary judgment.

Like the district court, we are

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[10] The guaranties limit the defendants' liability to a maximum of $3,202,500. All of the parties agree that this amount is the most that the RTC can recover under the guaranties. The defendants contend, however, that the RTC is not entitled to recover any sum.

persuaded that the guaranties in this case are not ambiguous. The word "indebtedness" is a legal term of art describing "[t]he state of being in debt, *without regard to the ability or inability of the party to pay the same.*" Black's Law Dictionary 691 (6th ed.1990)(emphasis added). The fact that a debt is non-recourse does not change the fact that the debtor is "in debt" to a creditor. Even though Northpark cannot be held liable for the amount of debt in its promissory note, it still incurred an "indebtedness" when it signed the note. The amount of the indebtedness is the total sum reflected in the note, plus interest and other costs. Since the defendants guarantied to pay "any and all indebtedness" which Northpark owed its creditors under the note, the defendants

should be required to satisfy the debt up to the express limit of their guaranties.[11] Any other construction of

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[11] In *Western Bank-Downtown v. Carline*, 757 S.W.2d 111 (Tex.App.--Houston [1st Dist.] 1988, writ denied), a Texas court of appeals addressed a situation similar to the situation in the instant case. The principal in *Carline*, Tex-La Transportation, Inc., executed a $1,000,000 promissory note to First Western Bank. The guarantors agreed to pay "any and all indebtedness" which Tex-La "may now or may at any time hereafter owe" the Bank. *Id.* at 114. Tex-La subsequently declared bankruptcy, and the Bank sought to collect from the guarantors the unpaid principal, post-petition interest and attorneys' fees. The guarantors did not dispute that they were liable for the unpaid principal. They argued, however, that they were not liable for the interest and attorneys' fees. The court of appeals agreed. Noting that the Federal Bankruptcy Act extinguished Tex-La's obligation to pay any post-petition interest and attorneys'

the guaranties would elevate form over substance. *Cf. FDIC v. University Anclote, Inc.*, 764 F.2d 804, 807(11th Cir.1985).[12]

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fees, *id.* at 113 & n.6, the court concluded that the guarantors also could not be held liable for the interest and fees. *Id.* at 114.

While the facts in *Carline* are similar to those here, *Carline* is distinguishable. In *Carline*, the debt was *extinguished*; thus, there was no remaining "indebtedness" for which the guarantors would have been liable. In the instant case, though, the debt continues to exist, even though it is non-recourse. The principal may not be liable for the unsatisfied "indebtedness," but there is a remaining "indebtedness" for which the guarantors can be held liable.

[12] The facts in *FDIC v. University Anclote, Inc.* are similar to the facts in the instant case. University Anclote executed a non-recourse promissory note in favor of Metropolitan Bank and

[15,16] We recognize that, as a general rule, the liability of a guarantor is equal to that of its principal. *Technical Consultant Serv., Inc. v. Lakewood Pipe of Texas, Inc.*, 861 F.2d 1357, 1363 (5th Cir.1988) (interpreting Texas law). But we also

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Trust Company. James C. Petersen executed a guaranty in which he agreed to pay "all indebtedness and liabilities" which University Anclote owed Metropolitan Bank. After University Anclote defaulted, the FDIC, as successor of the defunct Metropolitan Bank, sought recovery from Petersen on his guaranty. Petersen argued that he could not be held liable because the original promissory note was non-recourse. Applying Florida law, the Eleventh Circuit ruled that the guaranty was not ambiguous. 764 F.2d at 807. It noted that "[m]merely because Anclote cannot be held liable for a deficiency judgment does not mean that Anclote did not incur an indebtedness when it signed the note." *Id.* at 806.

recognize that there is an exception to the general rule: if the guarantor agrees, a guaranty contract can impose greater liability upon the guarantor than the note imposes upon the principal. *See Western Bank-Downtown v. Carline*, 757 S.W.2d 111, 114 n. 7 (Tex.App.--Houston [1st Dist.] 1988, writ denied); *Simpson v. MBank Dallas, N.A.*, 724 S.W.2d 102, 110 (Tex.App.--Dallas 1987, writ ref'd n.r.e.). By agreeing to pay the "indebtedness," the defendants agreed to accept greater liability for the debt.

[17,18] The defendants complain that they did not *intend* to "obligate themselves to pay the non-recourse portion" of the debt. However, when the guaranties are examined in light of the underlying note, it appears clear that the defendants indeed intended to accept

greater liability for the debt. The note provides that the guarantors of the debt are excluded from its non-recourse protection:

> Notwithstanding the promise to pay contained herein and notwithstanding any of the other provisions of this Note or of any other instrument evidencing, securing the payment of or executed in connection with this Note (*except to the extent otherwise provided with respect to the guaranties which are executed on even date herewith and which guarantee portions of the indebtedness evidenced hereby* ("Guaranties") and except to the extent otherwise provided in the Profit Sharing Agreement and except as otherwise provided in the

> immediately following sentence), the undersigned shall have no liability for the indebtedness and obligations of the undersigned pursuant to the Deed of Trust or any other instrument securing this Note or the loan evidenced hereby or executed in connection herewith or for the accrued and unpaid interest on this Note....

Promissory Note at 4 (emphasis added).[13]

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[13] When a guaranty agreement is absolute and unconditional, the defendants are deemed to have incorporated all of the terms of the note into the guaranty. *Hopkins v. First Nat'l Bank*, 551 S.W.2d 343, 345 (Tex. 1977); *First Bank of Houston v. Bradley*, 702 S.W.2d 683, 686 (Tex.App.--Houston [14th Dist.] 1985, no writ). Under Texas law, a guaranty is absolute and unconditional if it "requires no condition precedent to its enforcement against the

The defendants cannot reasonably argue that they did not intend to obligate themselves to pay the non-recourse portion of the note when the note itself excludes guarantors from its non-recourse protection.[14]

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guarantor other than mere default by the principal debtor." *United States v. Vahlco Corp.*, 800 F.2d 462, 466 (5th Cir.1986). The guaranties in this case do not require a condition precedent to enforcement other than Northpark's default. The fact that the guaranties limit the guarantied amount to $3,202,500 does not preclude them from being absolute and unconditional. *See Arndt v. National Supply Co.*, 633 S.W.2d 919, 923 (Tex.App.--Houston [14th Dist.] 1982, writ ref'd n.r.e.).

[14] The defendants suggest that the non-recourse provision of the note does *not* exclude them from its protection. Indeed, according to the defendants, the non-recourse provision

In sum, we find that under Texas law the defendants must bear responsibility for the unsatisfied indebtedness, up to the limit stated in their guaranties. While Northpark is not liable for the amount of its debt, it nonetheless has incurred an indebtedness. Because the guaranties unambiguously state that the defendants must pay the unsatisfied "indebtedness," the defendants have agreed to accept greater liability for the debt. This is especially true since the note itself excludes guarantors from

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supports their argument that they are not liable for the unsatisfied indebtedness because it recognizes that the guaranties only "guarantee portions of the indebtedness." At most, however, we believe that this language simply reflects the fact that the guaranties are limited to a maximum of $3,202,500.

its non-recourse protection. We conclude that the district court did not err in refusing to reconsider the state court summary judgment.

D. *"Reasonable" Attorneys' Fees*

[19] The defendants argue that the district court erred in granting the RTC a specific summary judgment of $93,463.60 in attorneys' fees. The guaranties provide for the recovery of "reasonable" attorneys' fees, and according to the defendants, the use of the term "reasonable" renders the amount of recoverable attorneys' fees a genuine issue of material fact. We disagree.

A party that moves for summary judgment bears the burden to establish that its opponent failed to raise a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106

S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). If the crucial issue is one on which the movant will bear the ultimate burden of proof at trial, then the movant can satisfy its summary judgment burden by submitting evidentiary documents that establish all of the elements of the claim or defense. *Id.* The burden then shifts to the nonmovant to demonstrate that summary judgment is inappropriate. *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 178 (5th Cir.1990).

In the instant case, the RTC satisfied its initial summary judgment burden. It submitted an affidavit from its attorney, G. Dennis Sheehan, who described the billable rate and the hours expended and concluded that "[t]he total amount of $93,463.60 is a reasonable amount for services rendered in this

matter." The burden then shifted to the defendants to demonstrate that summary judgment was inappropriate. The defendants could have filed a counter affidavit contesting the billable rate that the RTC claimed was "reasonable," or they could have filed an affidavit arguing that he billable hours claimed in the Sheehan exhibit were unreasonable. However, the defendants did neither of these things. They have failed to sustain their burden to demonstrate that summary judgment was inappropriate. *See* Fed.R.Civ.P. 56(e).

III. CONCLUSION

We are unable to conclude that the district court erred in granting summary judgment in favor of the RTC.

Accordingly, we affirm the judgment of the district court.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FIRST SAVINGS AND LOAN ASSOCIATION, F.A. and FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF TEMPLE,

Plaintiffs

THE RESOLUTION TRUST CORPORATION, as Receiver for First Savings and Loan Association, F.A., Waco,

Intervenor

vs.

CIVIL ACTION NO. CA3-90-1851-R

NORTHPARK JOINT VENTURE, STEVEN S. SCHIFF, CHARLES G. DANNIS, STEPHEN T. CROSSON, BARRY HOWARD, ROBERT L. SCHIFF, CHARGES H. PERRY, HERBERT G. SCHIFF, and TELSTAR PARTNERSHIP

Defendants

MEMORANDUM OPINION AND ORDER

This is a suit on the personal guaranties[1] of Defendants Steven S. Schiff, Charles G. Dannis, Stephen T. Crosson, Barry Howard, Robert L. Schiff, Charles H. Perry, and Herbert G. Schiff (with the exception of Crosson,[2]

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[1]Two guaranties are at issue in this case. The first guaranty was signed on April 26, 1985 by Defendants Herbert G. Schiff, Robert L. Schiff, Steven S. Schiff, Charles H. Perry, Charles G. Dannis, and Stephen T. Crosson. The second guaranty was signed on April 26, 1985 by Robert B. Howard. For purposes of deciding the motions discussed in this memorandum opinion, the two guaranties are the same. Accordingly, in this memorandum opinion the Court will cite to one "Guaranty," which covers the provisions in both guaranties.

[2]Plaintiffs and Intervenor have filed a separate motion for summary judgment against Defendant Crosson; thus, this memorandum order

collectively the Defendants). This suit was removed to this Court from the State District Court of Dallas County, 14th Judicial District. Now before this Court are Defendants' and Telstar Partnership's motion to reconsider a state court interlocutory summary judgment and for summary judgment and Plaintiff's motion for reconsideration of the law applicable to Plaintiffs' cross-motion for partial summary judgment. For the reasons that follow, this Court will DENY Defendants' and Telstar Partnership's motion for reconsideration and will GRANT Plaintiffs' motion.

FACTUAL BACKGROUND

First Federal Savings & Loan Association of Waco (First Federal Waco)

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and opinion will not discuss his personal guaranty.

and First Federal Savings & Loan Association of Temple (First Federal Temple) filed this action in a Texas state court on October 13, 1988 to recover a deficiency (the Deficiency) after foreclosure of land securing payment of a nonrecourse note (the Note). Northpark Joint Venture (Northpark) was the maker of the original note under which Defendants and Crosson are guarantors (the Guarantors) of the indebtedness. These guarantors constituted the joint venturers of Northpark. Northpark ultimately filed bankruptcy and was dismissed from this lawsuit. On November 18, 1988, Defendants (except Dannis) filed a counterclaim against Plaintiffs seeking a declaratory judgment that they were not liable under the Note or Guaranties and a

judgment for attorneys' fees. On December 5, 1988, Plaintiffs filed a Cross-Motion for Partial Summary Judgment seeking judgment for amounts due under the Note and Guaranties against Defendants. Defendants contended that in their guaranties they only guaranteed what Northpark owed under the Note, which amounted to nothing because the Note was nonrecourse and the Plaintiffs had foreclosed on the collateral securing the Note. Defendants also contended that they are not liable under Mississippi law because Plaintiffs did not show that they were equitably entitled to recover the Deficiency.

On January 3, 1989, the state court granted Plaintiffs' Cross-Motion for Partial Summary Judgment as to Defendants' liability for amounts due and

owing under the Guaranties of the Note, denying Defendants' Summary Judgment Motion on nonliability. Both parties filed motions for reconsideration, and on July 18, 1989, the court reversed its prior ruling and found that Defendants were not liable under the Guaranties. Plaintiffs filed a motion for reconsideration, and on August 28, 1989, the state court again reversed its ruling and found that Defendants were liable for the indebtedness under the Note, up to the express limit in the Guaranties, which is $3,202,500.00, and for interest under the Note up to the date that Northpark filed bankruptcy. Some Defendants filed a motion for reconsideration of the court's third ruling. On September 28, 1989, after a hearing on the matter, the court denied

Defendants' motion for reconsideration and found that its third decision, signed September 6, 1989 was correct. The court therefore refused to set aside the September 6, 1989 interlocutory summary judgment in favor of Plaintiffs on the issue of Defendants' liability for Northpark's indebtedness under the Guaranties.

In the September 28, 1989 order, the state court delimited the following for trial:

1. The legal issue of whether Texas or Mississippi law applies to Plaintiffs' action for recovery of the deficiency from the guarantors; and

2. The following factual issues; (i) If Mississippi law applies to this action, are Plaintiffs entitled to recover the deficiency from the guarantors under principles of equity;

   (ii) Whether, and to what extent if any, the Defendants are

liable for attorneys' fees incurred by Plaintiffs in connection with the foreclosure in Mississippi and other collection efforts, and whether, and to what extent, if any, the Plaintiffs are liable for Defendants' attorneys' fees in connection with the declaratory judgment action;

(iii) Whether, and to what extent, if any, Plaintiffs are liable to Telstar Partnership under Chapters 9 and 37 of the Texas Civil Practice & Remedies Code; and,

(iv) Costs of suit.

During the pendency of this suit, Intervenor was appointed receiver of First Federal Waco and conservator of First Federal Temple. Intervenor intervened in the state court action and removed the action to this Court on August 9, 1990.

ANALYSIS

I. Summary Judgment standard.

In considering motions for summary

judgment, this Court recognizes that summary judgment is appropriate only when no issues of material fact exist and the movant is entitled to judgment as a matter of law.[3] A court must draw all reasonable inferences of fact in favor of the party opposing the motion.[4] Indeed, as long as some evidence supports the disputed allegations, the court must deny the motion.[5]

II. Should this Court reconsider the state court's September 28, 1990 interlocutory summary judgment?

After four rounds of motions and

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[3]Fed. R. Civ. P. 56(c); Walker v. Sears Roebuck, 853 F.2d 355, 358-59 (5th Cir.1988).

[4]Walker, 853 F.2d at 358; Reid v. State Farm Mut. Auto Ins. Co., 784 F.2d 577, 578 (5th Cir. 1986).

[5]Coke v. General Adjustments Bureau, 640 F.2d 584, 595 (5th Cir. 1981) (en banc).

hearings on the issue, the state court ultimately found Defendants liable under the Guaranties for all unpaid principal under the Note as limited by the Guaranties (a total of $3,202,500.00), plus accrued but unpaid interest under the Note through December 2, 1988 ($1,312,993.91), after which interest continued to accrue at the maximum lawful rate of eighteen percent per annum until February 15, 1989, the date Northpark filed for bankruptcy. Now that Intervenor has removed the case to this Court, Defendants once again ask for reconsideration of the state court's interlocutory decision.

Under the terms of the Note, Northpark "shall have not liability for the indebtedness and obligations of [Northpark] pursuant to the Deed of Trust

or any other instrument securing this Note or the loan evidenced hereby or executed in connection herewith or for the accrued and unpaid interest on this note."[6] Under the terms of their Guaranties, Defendants agreed to pay jointly and severally "any and all indebtedness or other liability...which Northpark Joint Venture...may now or at any time hereafter owe Creditor, together with interest and collection costs as may be provided in any instrument evidencing said indebtedness or other liability."[7] Defendants contend that they are not liable under their Guaranties because Northpark was not liable under the terms of the Note.

Defendants' argument confuses the

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[6]Promissory Note as 4.

[7]Guaranty ¶ 1, at 1.

difference between "indebtedness" and "liability." Despite the fact that Northpark is not liable for the indebtedness underlying the Note, the indebtedness continues to exist. Defendants, in their Guaranties, agreed to pay Northpark's "indebtedness," up to a limit of $3,202,500.00. To construe the Guaranties as requiring Defendants to ante up only if Northpark is liable--which under the terms of the Note it could not be--would be to nullify the Guaranties. This Court is satisfied that the state court's ultimate interlocutory decision, dated September 28, 1989, is correct, and I therefore refuse to reconsider it.

III. Should this Court apply Texas or Mississippi law to determine this action?

Mississippi law, unlike Texas law,

provides that a plaintiff has no right to a deficiency judgment until the plaintiff proves that it would be equitable, in light of the sales price, to authorize a deficiency judgment.[8] If Mississippi law applies in this case, summary judgment is inappropriate as Plaintiff has not presented evidence clearly establishing its equitable right to collect a deficiency judgment.

The Guaranties on which Plaintiffs sue contain no choice of law clause, although they do contain a clause specifying that the Guaranties are performable in Dallas County, Texas and waiving the right to be sued anywhere but

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[8]Lake Hillsdale Estates, Inc. v. Galloway, 473 So. 2d 461, 466 (Miss. 1985); Mississippi Valley Title Ins. Co. v. Horne Constr. Co., 372 So. 2d 1270, 1272 (Miss. 1979).

Dallas County, Texas.[9] The Promissory Note specifies that it shall be governed by the laws of the State of Texas.[10] The Deed of Trust's choice of law clause reads as follows:

> [If the Grantor defaults on obligations, the] Trustee...shall... sell all or any part of the Property after giving notice of the time, place and terms of sale as required by Section 89-1-55 of the Mississippi Code of 1972...Grantor shall remain liable for any deficiency on the Obligations.[11]

Mississippi law therefore governs any right to a deficiency judgment under the Deed of Trust that Plaintiff might have.

Plaintiffs are not suing under the Deed of Trust, however. Rather, Plaintiffs suing Defendants on their Guaranties, in which they contracted with

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[9]Guaranty ¶ 11, at 3.

[10]Promissory Note at 2.

[11]Deed of Trust ¶ 9, at 3.

Plaintiffs that they would be liable for up to $3,202,500.00 of Northpark's indebtedness to Plaintiffs. The Guaranties stand alone as contracts between the creditors and Defendants in this action, and the consideration supporting the Guaranties differs from that supporting the Deed of Trust. For this reason, the Deed of Trust's deficiency judgment clause is not at issue in this lawsuit.

As the Guaranties have no choice of law provision, this Court must determine whether Mississippi law or Texas law applies. As the forum state, Texas choice of law rules determine which state's law the Court will apply to resolve the substantive issue raised in

this case.[12] In resolving conflicts of laws, Texas courts apply the most significant relationship analysis.[13]

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[12]Cook v. Frazier, 765 S.W.2d 546, 549 (Tex. App.--Fort Worth 1989, no writ).

[13]Duncan v. Cessna Aircraft Co. 665 S.W.2d 414, 420-21 (Tex. 1984); Cook v. Frazier, 765 S.W.2d 546, 549 (Tex. App.--Fort Worth 1989, no writ). The Texas Supreme Court in Duncan v. Cessna Aircraft Co. described the most significant relationship methodology as identical to the approach set forth in §§ 6 and 145 of the *Restatement (Second) of the Conflict of Laws.* Duncan, 665 S.W.2d at 420-21. Section 6 of the *Restatement (Second)* states the general principles of the most significant relationship analysis as follows:

(1) A Court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include

Under the most significant relationship analysis, a court will apply the law of the state with the most significant relationship to the particular

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(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

Id. at 420-21 n.5.

substantive issue to resolve the issue.[14] Therefore, in determining the most significant relationship, a court first must identify those state contacts that the court should consider.[15] Once the contacts are established, the question of which state's law will apply is a question of law.[16] Through a consideration of the qualitative nature of the contacts the court has identified, the court selects the applicable law.[17]

> (1) The parties negotiated and executed the Guaranties in Texas.
>
> (2) Texas residents and a Texas corporation negotiated and executed the Guaranties.

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[14]Duncan, 655 S.W.2d at 421.

[15]Id.

[16]Id. (citing Guttierrez v. Collins, 583 S.W.2d 312, 319 (Tex. 1979)).

[17]Id. (citing Guttierez, 583 S.W.2d at 319).

(3) All plaintiffs are Texas residents or domiciliaries.

(4) All defendants, except one, were Texas residents or domiciliaries at the time of execution.

(5) The Guaranties, by their own express terms, are wholly performable in Texas.

(6) The Guarantors expressly agreed to be sued in Texas.

(7) The Guaranties guarantee a note negotiated in Texas and executed in Texas between Texas residents and domiciliaries.

(8) The Note is wholly performable in Texas, and the Note contains a choice of law provision naming Texas as the choice of law state.

Mississippi's only contacts with the issue are the land located in Mississippi and the Deed of Trust provision choosing Mississippi law for foreclosure and deficiency judgment.

The purpose under Mississippi law is to protect Mississippi citizens. None of the Defendants are Mississippi citizens.

Indeed, the application of Mississippi law in this case would defeat a claim that a Texas domiciliary has brought against Texas residents. Mississippi legislators, when they enacted this statute, probably had no interest in protecting Texans. Consequently, Mississippi has no legitimate reasons to be concerned about the application of its laws to a Texas contract, the result of which would cut off a Texas domiciliary's claim against Texas residents.

Examining the above-listed contacts, this Court finds that the parties to the Guaranties had justified expectations that Texas law would apply to their Guaranties and that Texas law would provide greater certainty, predictability, and uniformity of result in all cases involving guaranties that guarantee

a note that property in a state other than Texas secures. Finally, other Texas courts have based the decision of which state has the most significant relationship to contracts upon the place the parties negotiated the contracts, the place the parties executed the contracts, the residences of the parties, and the state of performance of the contract.[18]

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[18] Cf. Cook v. Frazier, 765 S.W.2d 546, 549 (Tex. App.--Fort Worth 1989, no writ) (choosing Texas law to interpret contract using most significant relationship test because Texas residents negotiated and executed contracts and made all payments under contract in Texas); Aerospatiale Helicopter Corp. v. Universal Health Servs., Inc., 778 S.W.2d 492, 499 (Tex. App.--Dallas 1989, writ denied) (finding contract had "reasonable relation" to Texas and applying Texas law because plaintiff's facilities and headquarters located in Texas and lease payments made to Texas headquarters).

The location of all of these places is Texas. Thus, not only are all of the contacts to the Guaranties within Texas, but also all of the factors that determine the applicable law indicate that Texas laws are the most appropriate. Accordingly, Texas law is the proper law to apply in this case, and summary judgment is appropriate on the conflicts of laws issue. Plaintiffs thus need not prove that they are equitably entitled to collect from Defendants on the Defendants' Guaranties.

IV. Are Defendants liable for Plaintiffs' attorneys' fees?

Defendants claim that, because they are not liable under the Guaranties, they also are not liable for attorneys' fees. The Guaranties state, however, that the Guarantors "agree to pay in addition to said indebtedness, a reasonable amount as

attorneys' fees should this Guaranty be placed in the hands of an attorney for collection or should it be collected through may court, together with all costs of collection and/or suit."[19]

This agreement unambiguously requires Defendants to pay Plaintiffs' attorneys' fees, and summary judgment is appropriate on this issue.

CONCLUSION

For all of the reasons stated above, this Court DENIES Defendants' and Telstar Partnership's motion to reconsider a state court interlocutory summary judgment. Furthermore, this Court GRANTS Plaintiff's motion for reconsideration of the law applicable to Plaintiffs' cross-motion for partial summary judgment. Accordingly, Defendants' are jointly and

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[19]Guaranty ¶ 2, at 1.

severally liable on their Guaranties for up to $3,202,500.00 of principal, all accrued and unpaid interest, and costs of collection, including reasonable attorneys' fees. Additionally, Texas law applies to this action on the Guaranties.

SIGNED THIS 9TH DAY OF APRIL, 1991.

UNITED STATES DISTRICT JUDGE
JERRY BUCHMEYER

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FIRST SAVINGS AND LOAN ASSOCIATION, F.A. and FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF TEMPLE,

Plaintiffs

THE RESOLUTION TRUST CORPORATION, as Receiver for First Savings and Loan Association, F.A., Waco,

Intervenor

vs.

CIVIL ACTION NO. CA3-90-1851-R

NORTHPARK JOINT VENTURE, STEVEN S. SCHIFF, CHARLES G. DANNIS, STEPHEN T. CROSSON, BARRY HOWARD, ROBERT L. SCHIFF, CHARGES H. PERRY, HERBERT G. SCHIFF, and TELSTAR PARTNERSHIP

Defendants

FINAL JUDGMENT

On April 9, 1991, the Court, after considering the various Motions for Summary Judgment of the Plaintiffs/ Intervenors and the Defendants, found that Plaintiffs/Intervenors' Motion for Summary Judgment should be in all things granted, while at the same time Defendants' Motion for Summary Judgment should be in all things DENIED.

Accordingly, it is ORDERED, ADJUDGED AND DECREED that Plaintiffs/Intervenors have and recover judgment against the Defendants, Herbert V. Schiff, Robert L. Schiff, Steven B. Schiff, Charles H. Perry, Charles G. Dannis, and Stephen T. Crosson, jointly and severally, in the principal sum of $3,202,500.00, plus accrued and unpaid interest as of September 23, 1988 in the sum of $1,200,683.11.

It is FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiffs/Intervenors have and recover from the Defendants, jointly and severally, default interest from September 23, 1988, until December 31, 1990, which amount totals $1,330,086.94.

It is FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiffs/Intervenors have and recover from the Defendants, jointly and severally, reasonable attorneys' fees in the amount of $93,463.60.

It is FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiffs/Intervenors recover from Defendants, jointly and severally, all costs of court, as well as post-judgment interest of the maximum rate allowed by law accruing hereon.

It is FURTHER ORDERED, ADJUDGED AND DECREED that all relief sought herein by Defendants is hereby DENIED.

All relief not specifically herein granted is hereby DENIED.

SIGNED this 20th day of May, 1991.

UNITED STATES DISTRICT JUDGE
JERRY BUCHMEYER

IN THE DISTRICT COURT OF
DALLAS COUNTY, TEXAS
14TH JUDICIAL DISTRICT

NO. 88-13125-A

FIRST SAVINGS AND LOAN
ASSOCIATION OF WACO,
and FIRST FEDERAL SAVINGS
AND LOAN ASSOCIATION OF TEMPLE

Plaintiffs,

vs.
NORTHPARK JOINT VENTURE,
STEVEN S. SCHIFF, CHARLES G.
DANNIS, STEPHEN T. CROSSON,
BARRY HOWARD, ROBERT L.
SCHIFF, CHARLES H. PERRY,
HERBERT G. SCHIFF, AND
TELSTAR PARTNERSHIP

DEFENDANT STEPHEN T. CROSSON'S
ORIGINAL CROSS-CLAIM

NOW COMES, STEPHEN T. CROSSON, Defendant in the above-styled and numbered cause, now acting as and hereinafter designated as Cross-Plaintiff, complaining of Defendant TELSTAR PARTNERSHIP, and for cause of

action shows the following by way of counter-claim:

I.

Defendant TELSTAR PARTNERSHIP is a Texas General Partnership with its place of business in Dallas, Dallas County, Texas. TELSTAR PARTNERSHIP is a Defendant in the above-styled and numbered cause and has been served and answered herein.

II.

Cross-Plaintiff would show that on or about June 5, 1984, TELSTAR PARTNERSHIP, by and through STEVEN S. SCHIFF, Managing Partner, executed an agreement wherein TELSTAR PARTNERSHIP agreed and represented that Cross-Plaintiff would have no liability for any of the debts or liabilities of NORTHPARK JOINT VENTURE, and in furtherance of such

agreement agreed to protect and hold harmless Cross-Plaintiff from any debts or liabilities of NORTHPARK JOINT VENTURE.

III.

Cross-Plaintiff would show that pursuant to the agreement that if Cross-Plaintiff should have any liability to Plaintiff or any Defendant herein that such liability would be liability for the debts and obligations of NORTHPARK JOINT VENTURE, and that TELSTAR PARTNERSHIP would be liable to Cross-Plaintiff for such debts and obligations, and for attorney's fees, costs of court, and other costs and damages incurred because of those liabilities.

WHEREFORE, PREMISES CONSIDERED, Cross-Plaintiff prays that TELSTAR indemnify and hold Cross-Plaintiff

harmless from any liability asserted by Plaintiffs or Defendants herein against Cross-Plaintiff, and that Cross-Plaintiff have and recover damages equal to any liability imposed on Cross-Plaintiff in that suit, attorneys' fees, costs of court, and such further relief to which he may be entitled.

Respectfullysubmitted,

Robert D. Lybrand
State Bar No. 12712100
401 Expressway Tower
6116 N. Central Expwy.
Dallas, Texas 75206
(214) 369-1077
ATTORNEY FOR DEFENDANT
STEPHEN T. CROSSON

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument has been sent certified mail, return receipt requested all counsel of record on this 27th day of January, 1989.

Robert D. Lybrand

IN THE DISTRICT COURT OF
DALLAS COUNTY, TEXAS
14TH JUDICIAL DISTRICT

NO. 88-13125-A

FIRST SAVINGS AND LOAN
ASSOCIATION OF WACO,
and FIRST FEDERAL SAVINGS
AND LOAN ASSOCIATION OF TEMPLE

Plaintiffs,

vs.
NORTHPARK JOINT VENTURE,
STEVEN S. SCHIFF, CHARLES G.
DANNIS, STEPHEN T. CROSSON,
BARRY HOWARD, ROBERT L.
SCHIFF, CHARLES H. PERRY,
HERBERT G. SCHIFF, AND
TELSTAR PARTNERSHIP

DEFENDANT CHARLES G. DANNIS'
ORIGINAL CROSS-CLAIM

NOW COMES, CHARLES G. DANNIS, Defendant in the above-styled and numbered cause, now acting as and hereinafter designated as Cross-Plaintiff, complaining of Defendant TELSTAR PARTNERSHIP, and for cause of

action shows the following by way of counter-claim:

I.

Defendant TELSTAR PARTNERSHIP is a Texas General Partnership with its place of business in Dallas, Dallas County, Texas. TELSTAR PARTNERSHIP is a Defendant in the above-styled and numbered cause and has been served and answered herein.

II.

Cross-Plaintiff would show that on or about June 5, 1984, TELSTAR PARTNERSHIP, by and through STEVEN S. SCHIFF, Managing Partner, executed an agreement (attached hereto as Exhibit "A") wherein TELSTAR PARTNERSHIP agreed and represented that Cross-Plaintiff would have no liability for any of the debts or liabilities of NORTHPARK JOINT

VENTURE, and in furtherance of such agreement agreed to protect and hold harmless Cross-Plaintiff from any debts or liabilities of NORTHPARK JOINT VENTURE.

III.

Cross-Plaintiff would show that pursuant to the agreement that if Cross-Plaintiff should have any liability to Plaintiff or any Defendant herein that such liability would be liability for the debts and obligation of NORTHPARK JOINT VENTURE, and that TELSTAR PARTNERSHIP would be liable to Cross-Plaintiff for such debts and obligations, and for attorney's fees, costs of court, and other costs and damages incurred because of those liabilities.

WHEREFORE, PREMISES CONSIDERED, Cross-Plaintiff prays that TELSTAR

PARTNERSHIP indemnify and hold Cross-Plaintiff harmless from any liability asserted by Plaintiffs or Defendants herein against Cross-Plaintiff, and that Cross-Plaintiff have and recover damages equal to any liability imposed on Cross-Plaintiff in this suit, attorney's fees, costs of court, and such further relief to which he may be entitled.

Respectfully submitted,

Deborah A. Wilson
State Bar #21674925
5445 La Sierra Drive
Suite 400
Dallas, Texas 75231
(214) 739-3388

ATTORNEY FOR DEFENDANT
CHARLES G. DANNIS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Defendant Charles G. Dannis' Original Counter-Claim has been mailed to Hand-Delivered to all attorneys of record, this the 18th day of July, 1989.

_____

Deborah A. Wilson

EXHIBIT "A"

TELSTAR

1001 Capital Bank Building

5307 East Mockingbird Lane

Dallas, Texas 75206

June 5th, 1984

Messrs. Charles G. Dannis,

Stephen Crosson, Robert B. Howard

8848 Greenville Avenue

Dallas, Texas 75243

RE: $3,440,000 loan from InterFirst Bank Dallas, N.A. ("Bank") to Northpark Joint Venture ("NP")

Gentlemen:

In accordance with the prior verbal agreement between each of you, on the one hand, and the undersigned, on the other hand, regarding Northpark, the undersigned hereby confirms to each of you, as follows:

Inasmuch as you are each joint venturers in Northpark, along with the undersigned, you will, as a matter of law, be jointly and severally liable to third parties for the debts and obligations of Northpark; however, as between you, on the one hand, and the undersigned, on the other, you shall have no liability for any of the debts or liabilities of Northpark, including specifically, but not being limited to (i) that certain Promissory Note of Northpark to be dated June 6th, 1984 in principal amount of $3,440,000.00, payable to the Bank, (ii) that certain Deed of Trust of even date with such Note securing payment of same; and, the undersigned agrees to save, protect and hold harmless each of you from any debts or liabilities of Northpark, including,

but not being limited to, the said Promissory Note and/or Deed of Trust, or any other instrument securing such indebtedness.

It shall not be necessary for any of you to execute this instrument and if the undersigned does not hear from you within the next two (2) days, it will be assumed that this letter is entirely satisfactory with you.

Yours very truly,

TELSTAR, a Partnership

By:_____

Steven S. Schiff

Managing Partner

NO. 91-1501

IN THE

UNITED STATES COURT OF APPEALS

FOR THE

FIFTH CIRCUIT

NEW ORLEANS, LOUISIANA

RESOLUTION TRUST CORPORATION, as receiver for First Savings and Loan Association of Waco and First Savings and Loan Association of Temple, and as conservator of First Savings and Loan, F.A., Temple, Texas,

Plaintiffs-Appellees,

V.

NORTHPARK JOINT VENTURE, et al., Defendants,

and

Steven S. Schiff, Charles G. Dannis, Stephen T. Crosson, Barry Howard, Robert L. Schiff, Charles H. Perry, Herbert G.

Schiff and Telstar Partnership, Defendants-Appellants.

PETITION FOR REHEARING

ROBERT D. LYBRAND
8333 Douglas Avenue
Suite 1215 - LB 48
Dallas, Texas 75225
214/369-1077

DEBORAH A. WILSON
5445 La Sierra Drive
Suite 400
Dallas, Texas 75231
214/739-3388

ATTORNEYS FOR APPELLANTS,
CHARLES G. DANNIS and
STEPHEN T. CROSSON

PETITION FOR REHEARING

NOW COMES CHARLES G. DANNIS and STEPHEN T. CROSSON, Appellants, and file this Petition for Rehearing, and for cause would respectfully show the Court of Appeals as follows:

1. PARTIES AND PROCEDURAL HISTORY.

References to "Dannis Appellants" herein shall refer only to Charles G. Dannis and Stephen T. Crosson, the appellants represented by the undersigned. The other appellants herein shall be referred to as the "Schiff Appellants".

On April 24, 1992, the Court of Appeals entered Judgment affirming the judgment of the trial court.

2. ISSUE NOT ADDRESSED BY THE COURT OF APPEALS.

The Dannis Appellants filed Cross-Claims against the Schiff Appellants prior to the removal of the case to federal district court. Those Cross-Claims were based upon the agreement of Telstar Partnership, one of the Schiff Appellants, to indemnity the Dannis

Appellants in relation to the note, deed of trust, and guaranty made the basis of this case. (Record Excerpts, Documents 6 and 7).

On appeal the Dannis Appellants argued that the entry of a final judgment denied them relief on their Cross-Claims without any hearing, trial or other action on those claims in the court below. (Dannis Appellants' Brief, P. 20).

The Court of Appeals opinion does not address this issue. The affirmance of the trial judgment's erroneously denies the Dannis Appellants of relief on those Cross-Claims.

3. MISSISSIPPI LAW MUST BE APPLIED TO DETERMINE THE DEFICIENCY.

The Court of Appeal's holding that Texas law controls the guarantors' liability under the note and guaranties

does not end the inquiry. The holder of the note must prove that the principal is indebted as a prerequisite to a judgment against a guarantor.

Mississippi law must be used to determine indebtedness of the principal in this case. The application of the proceeds of the Trustee's Sale is controlled by the Deed of Trust. Mississippi law determines the application of those proceeds and the effect of that sale.

Mississippi law requires proof that a deficiency is equitable as a prerequisite to the existence of a deficiency after a trustee's sale. Only after proof of that fact does the holder of the note establish the liability of the principal. Establishing the liability of the principal is a

prerequisite to enforcement of the guaranties.

4. THE GUARANTORS ARE NOT EXCLUDED FROM THE "NON-RECOURSE PROTECTION" OF THE NOTE.

The provisions of the note did not exclude the guarantors from the "non-recourse protection" of the note except to the "extent otherwise provided" in the guaranties. The guaranties did not contain any provision that affected the non-recourse protection of the note. The language of the guaranty agreements obligated the Appellants to pay the indebtedness that Northpark "may now or hereinafter owe." The items excepted from the non-recourse protection of the note (taxes, mechanic's liens, etc.), were the personal liability of the guarantors up to the maximum stated

amount. Only those amounts, not the deficiency on the note, can be recovered by the Appellee from the Appellants under the terms of the note and guaranties.

WHEREFORE, PREMISES CONSIDERED, the Dannis Appellants pray that this Court grant this Petition for Rehearing, and upon rehearing, reverse the judgment of the trial court and render judgment for Appellants, or remand the case to the trial court, or reverse the portion of the trial court's judgment that purports to render a final judgment and remand this matter for trial on the Cross-Claims filed by the Dannis Appellants, and for such other and further relief to which Appellants may be entitled.

Respectfully submitted,

ROBERT D. LYBRAND
State Bar No. 12712100
8333 Douglas Avenue
Suite 1215 - LB 48
Dallas, Texas 75225

214/369-1077
Fax# 214/987-4268

ATTORNEY FOR APPELLANTS
CHARLES G. DANNIS and
STEPHEN T. CROSSON

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument was sent by first class mail, postage prepaid, to Appellee's attorney, G. Dennis Sheehan, HAYNES AND BOONE, 3100 NCNB Plaza, 901 Main Street, Dallas, Texas 75202-3714, and to the attorney for all other Appellants, Tom Thomas, KOLODEY & THOMAS, 2300 Thanksgiving Tower, 1601 Elm Street, Dallas, Texas 75201-4713, on this the 7th day of May, 1992.

ROBERT D. LYBRAND

NO. 91-1501

IN THE

UNITED STATES COURT OF APPEALS

FOR THE

FIFTH CIRCUIT

NEW ORLEANS, LOUISIANA

CHARLES G. DANNIS and STEPHEN T. CROSSON,
APPELLANTS,

VS.

THE RESOLUTION TRUST CORPORATION
as Receiver for FIRST SAVINGS AND LOAN
ASSOCIATION OF WACO and Conservator of
FIRST FEDERAL SAVINGS AND LOAN
ASSOCIATION OF TEMPLE,

APPELLEE.

EXCERPTS FROM APPELLANTS' STEPHEN T. CROSSON and CHARLES G. DANNIS' BRIEF FROM THE COURT OF APPEALS

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ATTORNEYS FOR APPELLANTS,
CHARLES G. DANNIS and STEPHEN T. CROSSON

III. THE JUDGMENT ENTERED BY THE TRIAL COURT WAS NOT A FINAL JUDGMENT

An order styled "Final Judgment" was entered on May 20, 1991, providing that all relief not specifically granted was denied. Appellants had filed Cross-Claims against certain other Defendants seeking indemnity pursuant to other agreements. The motions and responses before the Court did not raise the issue of indemnity between the Defendants. Did the trial court err in entering a Final Judgment denying the Appellants' claims for indemnity against other Defendants without a hearing or trial thereon?

STATEMENT OF THE CASE

I. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

First Federal Savings and Loan Association of Waco and First Federal Savings and Loan Association of Temple ("Plaintiffs") filed suit in Dallas County District Court, 14th Judicial District, Dallas, Texas, on October 13, 1988. That action sought to recover the balance claimed due on a note from Telstar Partnership, Northpark Joint Venture, and its seven venturers, including Appellants. Real property located in Mississippi that secured the note had been foreclosed, and the Plaintiffs sought to recover the claimed deficiency. Northpark filed bankruptcy and was dismissed from the lawsuit.

On November 18, 1988, Defendants (except Dannis) filed a counterclaim against Plaintiff seeking a declaratory judgment that...

...create that liability, and the Note and Deed of Trust require application of Mississippi law.

Mississippi law requires additional proof that the deficiency is equitable based upon the sales price. A disputed issue of fact exists as to whether that deficiency is equitable, this summary judgment should not have been granted.

III. THE JUDGMENT ADJUDICATED CLAIMS NOT RAISED

Appellants filed Cross-Claims against other Defendants based upon an Indemnity Agreement between Appellants and Telstar Partnership. Those Cross-Claims were not place before the Court or put in issue by any motion or response filed. The entry of the Final Judgment, when all issues between the parties have not been disposed of, was error.

ARGUMENTS

I. STANDARD OF REVIEW

The Appellee must have shown by competent summary judgment evidence that there are:

1. No genuine issues as to any material fact; and,

2. Movant is entitled to judgment as a matter of law.

Bank of Commerce v. City National Bank, 484 F2d 284 (5th Cir., 1972).

In the instant case, if the Trial Court's holding as to the scope of the Appellant's liability is erroneous, there is insufficient summary judgment to support the entry of judgment.

...of Mississippi was expressly stated to apply. (Record Excerpts, Document, Page 2) In determining the existence of a deficiency after the foreclosure,

Mississippi law requires proof of the equitable nature of that sale and the proceeds obtained therefrom. Therefor the liability of Northpark cannot be determined until proof of the equitable nature of the sale is made by Plaintiff. Until Plaintiff's liability is proved, no liability arises under the Guaranties.

III. THE JUDGMENT ADJUDICATED CLAIMS NOT RAISED

The Trial Court's Judgment failed to dispose of all issues, and causes of action.

The Trial Court's Judgment states that all relief expressly granted is denied, and that it is a Final Judgment. (Record Excerpts, Document 3)

Both Appellants had, prior to the entry of that Judgment, filed Cross-Claims against other Defendants based

upon an Agreement of Indemnity. (Record Excerpts, Documents 6 and 7)

The various motions for summary, motions for partial summary judgments, motions to reconsider, and relate or responses thereto, did not raise nor decide the issues raised by the Cross-Claims.

A Summary Judgment cannot be granted on causes of action not raised in the motion. Capital Films Corp. v. Charlie Fries Productions, Inc. 628 F2d 387 (5th Cir., 1980).

Thus, the entry of Final Judgment denying all relief not granted was in error.

WHEREFORE, PREMISES CONSIDERED, Appellants Stephen T. Crosson and Charles G. Dannis pray that; the Judgment of the Trial Court be reversed, this case

remanded for trial, or a judgment be rendered that Appellants' liability under the terms of their Guaranty is limited to attorneys' fees, costs of collection, and the amount for which Northpark is personally liable, and for such other relief to which Appellants may be entitled, with costs taxed to the Appellee.

Respectfully submitted,

ROBERT D. LYBRAND
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8333 Douglas Avenue
Suite 1215 - LB 48
Dallas, Texas 75225
214/369-1077

ATTORNEY FOR APPELLANTS

C E R T I F I C A T E O F S E R V I C E

I hereby certify that a true and correct copy of the above and foregoing instrument was sent be first class mail to Appellee's attorney, G. Dennis Sheehan, HAYNES AND BOONE, 3100 NCNB Plaza, 901 Main Street, Dallas, Texas

75202-3714, and to the attorney for all other Appellants, Tom Thomas, KOLODEY & THOMAS, 2300 Thanksgiving Tower, 1601 Elm Street, Dallas, Texas 75201-4713, on this the 9th day of September, 1991.

_____

ROBERT D. LYBRAND